No. 10,571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION PAVING CO. (a corporation), PACIFIC INDEMNITY COMPANY (a corporation), and MARYLAND CASUALTY COMPANY (a corporation),

Appellants,

vs.

UNITED STATES OF AMERICA, for use and benefit of Soulé Steel Company (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

DION R. HOLM,
206 City Hall, San Francisco,
HENRY F. WRIGLEY,
1029 Monadnock Building, San Francisco,
Attorneys for Appellants.

Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

Texts

No. 10,571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION PAVING CO. (a corporation), PACIFIC INDEMNITY COMPANY (a corporation), and MARYLAND CASUALTY COMPANY (a corporation),

Appellants,

vs.

UNITED STATES OF AMERICA, for use and benefit of Soulé Steel Company (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment at law of the United States District Court for the Northern District of California in favor of the plaintiff, United States of America for use and benefit of Soulé Steel Com-

---

*For convenience, appellee Soulé Steel Company will be referred to herein as Soulé, subcontractor, Steel Company, or plaintiff, and appellants Union Paving Co., Pacific Indemnity Company, and Maryland Casualty Company will be referred to as Union Paving Co., Paving Co., or defendants.

All emphasis is supplied unless otherwise noted.

References to pages of the Transcript of Record are indicated thus: (1).

pany, and against the defendants, Union Paving Co., Pacific Indemnity Company, and Maryland Casualty Company, in the sum of $69,642.48, plus costs of suit.*

The District Court for the Northern District of California has jurisdiction of the action under Section 24(1)(b) of the Judicial Code, as amended (28 U. S. C. A. 41(1)(b)) and Section 51 of the Judicial Code, as amended. (28 U. S. C. A. 113.)

The plaintiff is a California corporation (2) and the defendants, Union Paving Co. is a Nevada corporation (3), Pacific Indemnity Company, a California corporation (3), and Maryland Casualty Company is a Maryland corporation (3).

The amount in controversy, exclusive of interest and costs, exceeds the sum of $3000.00. (8, 66.)

The pleadings necessary to show the jurisdiction of the District Court are the complaint (1 to 18), the answer and cross-claim (19 to 40), the answer to cross-claim (41 to 44) and amendment to the answer to cross-complaint. (45.)

The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction under Section 128(a)(d) of the Judicial Code, as amended. (28 U. S. C. A. 225 (a)(d).)

The judgment of the District Court was entered on May 10, 1943. (67.) On May 17, 1943 a motion for new trial was made (70) and on July 7, 1943 an order denying motion for new trial was made and entered (72) and on August 6, 1943 the defendants filed their notice of appeal (73); the transcript of record on

appeal was certified by the Clerk of the District Court on September 7, 1943 (74) and was filed in the office of the Clerk of this Court on September 27, 1943. (526.)

STATEMENT OF THE CASE.

The Department of Interior (Bureau of Reclamation) entered into a contract on November 4, 1939 with Union Paving Co. for the construction of four separate abutments and ten separate piers of various dimensions in connection with the relocation of the Southern Pacific Railroad and U. S. Highway 99 near Redding, Shasta County, California. This work was necessary as when the Shasta Dam, which is part of the Central Valley Project is completed, the reservoir formed back of it would flood the existing highway and railroad.

Union Paving Co. under the contract agreed, among other things, to construct abutments and piers extending across a canyon through which the Pit River flows. On top of these abutments and piers was to rest a double-decked bridge, one level of which would accommodate the Southern Pacific Railroad and the other for general traffic. The engineering and contract work required keen engineering skill. The contract price between the Department of the Interior and Union Paving Co. for the work described was $1,138,888. The contract was bid on a unit price basis and made Union Co. subject to a penalty of $100.00 per day for each day's delay that the work was not completed within the contract period. The abutments and piers

were designed and constructed to support a bridge 3587 feet long and two of the piers were in excess of 350 feet above the streambed, and 95 by 90 feet and 95 feet square, respectively, at the base. The materials out of which the piers were to be constructed were concrete and steel reinforcement bars.

The contract between the Department of Interior and Union Paving Co. was silent as to who would pay the cost of constructing falsework or scaffolding necessary, first to put the reinforcement steel bars in place and thereafter to be used to pour concrete.

On January 6, 1940 Union Paving Co. entered into a subcontract with Soulé Steel Company and under the terms of this contract Soulé agreed to furnish all labor, tools, accessories and equipment necessary to place the reinforcement bars and piers that were to support the bridge. The government furnished the reinforcement bars. The work to be performed by Soulé was to be done in accordance with the specifications covering the contract between Union Paving Co. and the Department of Interior.

Two of the paragraphs of the subcontract that require the interpretation of this Court, read as follows:

> "The subcontractor at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding, in accordance with

the provisions of paragraph 24 of said specifications." (14.)

The specifications referred to were those between Department of Interior and Union Paving Co.

And the second paragraph of the contract between Soulé and Union to be interpreted, reads as follows:

"The subcontractor at its own cost agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications.

"Time is of the essence of this agreement and the subcontractor agrees that it will proceed with the placing of reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each section and prosecute the same diligently to completion, unless prevented by strikes, lockouts or other contingencies beyond its control.

"The subcontractor agrees that the contractor shall have the right to use its rigs and equipment upon the job for the purpose of lifting and hoisting materials, equipment and forms at all times, when the same is not in use by the subcontractor, free from any charge, except that said contractor agrees to assume all risk or loss to said equipment, from said contractor's use thereof, and shall save the subcontractor harmless from any damage, claim or loss arising from said use.

"The contractor at its own cost agrees to provide an accessible roadway from Highway 99 to the base of all piers and abutments; construct a

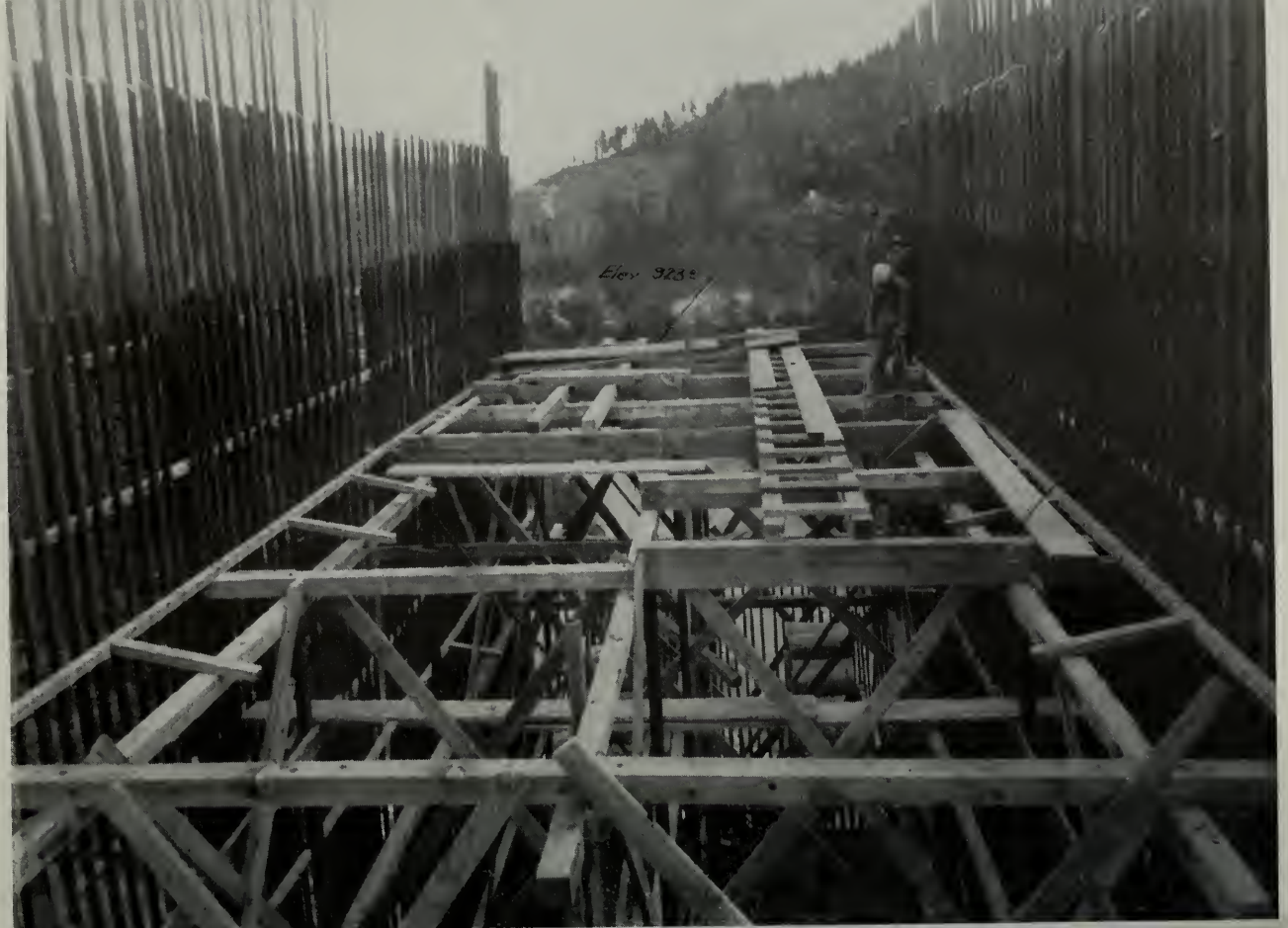
wooden trestle over and about the base of all pier excavations and construct wooden cores as shown on the plans which may be used by the subcontractor as a supplementary support for reinforcement bars; said subcontractor assuming the risk of any damage to said trestles or cores arising directly or indirectly from the use thereof and shall save and hold harmless said contractor from any damages, claims or losses.

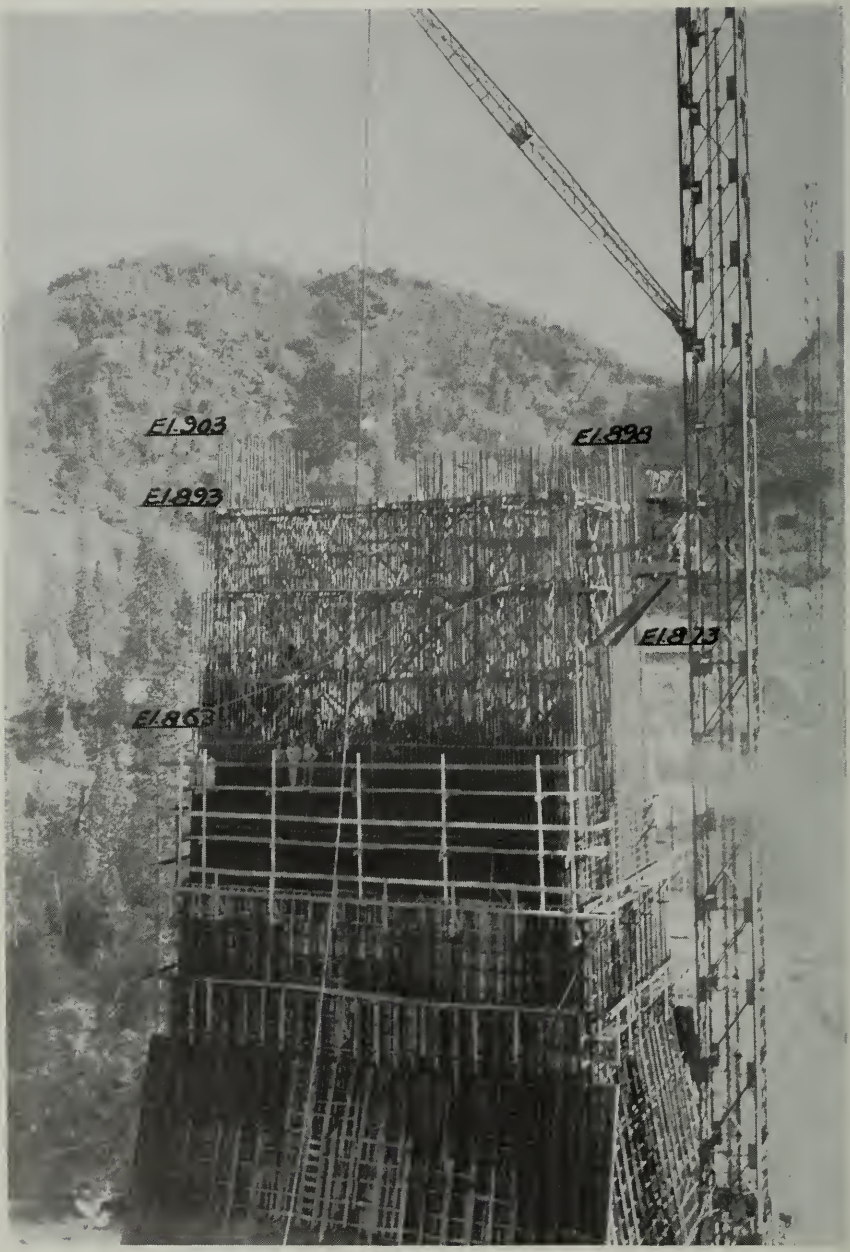
"The contractor at its own cost agrees to provide sufficient electric current at or near the base of each pier and install electric energy for the operation of the subcontractor's equipment.

"The contractor at its own cost agrees to provide and pour necessary concrete sills in the base of all piers sufficient to support reinforcing steel mats.

"The contractor agrees to pay said subcontractor for placing reinforcement bars at the rate of $22.50 per ton for reinforcement bars actually placed in accordance with the plans and specifications which shall be considered as full compensation for unloading, warehousing, hauling, bending and placing reinforcement bars and clamps, and doing all work necessary or incidental thereto and for furnishing all tie wire, clamps and supporting devices." (15 and 16.)

The price agreed upon between Soulé and Union was that the subcontractor would be paid $22.50 per ton for reinforcement bars actually placed in accordance with the plans and specifications. Soulé did place 5533 tons of these reinforcement bars and Union Paving Co. paid Soulé the sum of $63,612.29. (58, 59,


Elev 323'



Defendants' Exhibit A

97.) The difference between the sum paid and $124,495 which was the cost of placing 5533 tons of reinforcement bars (89) represented approximately one-half of the cost to Union Paving Co. for the erection of falsework and scaffolding primarily required to place the steel bars and secondarily used by Union Paving to pour concrete. The total cost of constructing the falsework was $117,916. (286, 287.) Of this sum Union Paving Co. charged itself with the amount of $56,803 and charged to Soulé $61,112. (287.)

No charges were made against Soulé for falsework or temporary supports on abutments 2, 3 and 4 or piers 8, 9 and 10. (286, 287, 302.)

These abutments and piers were smaller units and the reinforcement bars were placed in position and rested on rock base or concrete curbs or sills and were self-supporting. They required no welding or falsework to support them.

This case concerns the reinforcement bars placed in abutment 1 and piers 1, 2, 3, 4, 5, 6 and 7. The reinforcement bars used in these piers are about 2″ square and in 60-foot lengths and weighing approximately 900 pounds, required welding and falsework or interior framework to support them as they were placed in a variable oblique or sloping position.

J. A. Dowling, manager of Union Co., testified that in July, 1940 at the job site he discussed with L. E. Stevens, a partner with Soulé Company (335) that some agreement should be reached of how the charges for the interior structures should be apportioned and

Mr. Stevens replied he would take it up with San Francisco (meaning the office of Soulé Company) and nothing happened until September, 1940 when a similar conversation occurred with Mr. Stevens, with similar results. About these conversations there is a conflict.

On October 25, 1940, Soulé, with its employees (436, 437), undertook to and actually constructed the falsework and interior framework.

Edward L. Soulé, president of Soulé Steel Company, was aware that Union had stopped making payments in July, 1940 (336) but knew as early as October 15, 1940 (336, 339) that the proration of the cost of the falsework was to be made.

On October 15, 1940 there remained to be done under the Soulé contract more than 50 per cent of the work contemplated and provided for under the contract.

The estimate of steel placed as of September 30, 1940 was 2000 tons, as appears from Plaintiff's Exhibit No. 7. (85.)

The subcontract of Soulé was completed May 30, 1941. (96.)

After October 15, 1940 Soulé accepted a payment on January 18, 1941 from Union Paving Co. of $20,000 (95) and another payment on December 31, 1941 of $16,000. (59.) In other words, Soulé accepted $36,000 in two payments after October 15, 1940, when it knew the charges for the falsework or scaffolding

was to be made against it and at a time when more than 50 per cent of the work under the contract remained to be performed.

Soulé Company did not give notice of rescission or endeavor to rescind the contract with Union Co. or notify Union that it refused to pay its proportion of the cost of the construction of the falsework and scaffolding or interior framework until after the completion of the contract. No notice was served on Union that Soulé would refuse to pay these costs.

Fraud or deceit is not alleged or intimated in this suit. This contract was drawn between two men of equal business experience, Edward L. Soulé representing the Steel Company, and J. A. Dowling the Paving Co.

PLEADINGS AND PROCEEDINGS HEREIN.

The complaint was filed on September 17, 1942. The complaint is based on one count, alleges the contract between Union Paving Co. and United States of America and the subcontract between Union Paving Co. and Soulé Steel Company. It sets out that the Paving Co. agreed to pay the Steel Company $124,393 for the furnishing and supplying of labor and materials, tools and equipment under the contract for which the Paving Co. agreed to pay the sum last stated, plus certain additions to the contract, and after alleging that the Paving Co. had paid $63,712 it prayed for $61,352 with interest as remaining unpaid by the Union Paving Co.

The insurance companies named defendants had supplied a payment bond as sureties to the United States insuring payment to all persons supplying labor and material in the contract between Union Paving and the United States.

Attached to the complaint as Exhibit "B" is the "Memo of Agreement" between Union Paving Co. and Soulé Steel Company. The answer and cross-claim of defendants was filed October 17, 1942, in which it is denied there was any amount of money due Soulé from Union, and by way of cross-claim pleaded the contract between the United States and Union Paving Co. and the subcontract between Union Paving Co. and Soulé Steel Company, alleging that the latter failed and refused to do all work necessary and incident to the placing of said reinforcing bars by not providing necessary temporary supports and supporting devices to place the bars, which Union did at the reasonable cost of $58,835.

Other items of expenditures made by Union for Soulé were pleaded, setting out that all indebtedness of Soulé to Union was $61,112.

An answer to the cross-claim was filed November 21, 1942 denying the allegations of the cross-claim setting out it was the duty of Union to erect the falsework and scaffolding, and denying it was indebted under the contract in the sum set forth in the cross-claim. Thereafter, on November 25, 1942, an amendment to the answer to "cross-complaint" was filed, denying certain additional allegations of the cross-claim.

After trial by the Court, findings of fact and conclusions of law, to which reference will hereafter be made in this brief, were made and filed, and on May 10, 1943, judgment was entered for plaintiff as prayed for in the complaint and denied judgment on the cross-complaint of defendant. In the judgment plaintiff recovered the sum of $69,643 plus $299 costs. On May 17, 1943, a motion for new trial was made in behalf of defendants and on July 7, 1943 an order was made denying the motion for new trial.

QUESTIONS INVOLVED.

The questions involved in this appeal are:

1. Does the subcontract between Union Paving Co. and Soulé Steel Company provide that Soulé was to pay for the cost of constructing the falsework and interior framework to support the reinforcement bars?

2. Was it not the duty of Soulé Steel Company when it was admittedly aware on October 15, 1940, when more than half of the contract remained to be completed, that the cost of the falsework and interior framework was to be charged against it, to have given notice of rescission of the contract and rescinded the same?

3. Did not the Court err in admitting testimony of oral negotiations leading up to the entering into the written contract that altered the terms of the written instrument?

SPECIFICATION OF ERRORS.

Defendants specify the following errors upon which they will rely in the prosecution of this appeal from the judgment of the District Court in this cause made and entered on May 10, 1943. Defendants specify that the District Court erred in each of the following particulars:

1. The District Court erred in granting judgment to plaintiff for a proportionate cost of the construction of falsework and interior framework that was essential for the uses of plaintiff in placing the reinforcement steel bars and where plaintiff undertook and actually did the construction of the falsework during one day of the contract and the contract provided that the plaintiff

> "at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding",

and where the contract further provided that plaintiff

> "at its own cost agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications",

(referring to specifications between the Department of Interior and Union Paving Co.) all of which was essential for the use of plaintiff in placing the reinforcement steel bars.

2. The District Court erred in finding:

"IX.

"The Court finds that it was the mutual intention of the parties as it existed at the time of the making of the contract of January 6, 1940, that said defendant, Union Paving Co., should erect and pay the cost of the erection of the falsework, scaffolding and interior framework of Abutment No. 1 and Piers 1, 2, 3, 4, 5, 6, and 7, and that the plaintiff should not erect or pay any of the cost of the erection of said falsework, scaffolding and interior framework, but that plaintiff should have the right without cost to use said falsework, scaffolding and interior framework for the purpose of supporting, placing and securing in position the reinforcing bars." (56; Finding IX.)

The foregoing finding is unsupported by the evidence, as the contract between plaintiff and defendant Union Co. contemplated and provided that Soulé Company should pay the cost of the erection of the falsework, scaffolding and interior framework, all necessary for the placing of the reinforcement steel bars.

3. The District Court erred in holding that plaintiff recover damages for the alleged breach of the written contract between plaintiff and defendant Union Co. based on an alleged breach, when more than 50 per cent of the work to be done under the contract had not been performed and plaintiff failed to give notice of rescission and failed to rescind the contract.

4. The District Court erred in giving judgment to plaintiff when plaintiff admitted it was notified in October of 1940, when less than 50 per cent of the contract was completed, that plaintiff was to pay the cost of constructing the falsework or interior framework supporting the steel bars placed by plaintiff, and then continued with the contract, accepting all benefits thereunder, including the acceptance of $36,000 in two payments made, respectively, on January 18, 1941 in the amount of $20,000 and on December 31, 1941 in the amount of $16,000.

5. The District Court erred in giving judgment for plaintiff when the evidence disclosed that plaintiff had completed its contract on May 30, 1941 (96) and thereafter accepted a payment on December 31, 1941 in the amount of $16,000 from defendant due under the contract, after plaintiff was aware defendant expected and demanded plaintiff to pay for the cost of the falsework or interior framework, which payment was withheld by defendant until the cost of the construction of the falsework or interior framework had been offset.

6. The following errors were committed by the District Court in admitting oral evidence tending to vary the terms of the written contract dated January 6, 1940, between plaintiff and defendants.

(a) Testimony by witness Ross L. Mahon (225 to 231), in which he stated conversations held during October, 1939 between J. A. Dowling, the then manager of Union Paving Co., and Edward L. Soulé,

president of plaintiff company, one conversation being in Dowling's room at the Senator Hotel at Sacramento at 10 or 11 o'clock in the evening (229) while Dowling was in bed, the substance of the latter conversation being, Soulé quoted a price of $33.80 a ton for the reinforcement steel to be installed, which included the cost of supporting structure for the steel. Objection to this testimony was made by Mr. Wrigley, then counsel for defendants, as follows:

Mr. Wrigley. I want to object to this as irrelevant, incompetent and immaterial. The parties in this case entered into a formal written contract as of January 6, 1940 that superseded all prior negotiations, discussions, offers and everything else, and anything they may have agreed prior to that date was carried into that contract and cannot be admissible under the California Civil Code, Section 1625. (226.)

The Court. I will allow it subject to a motion to strike. (227.) * * *

Mr. Wrigley. May it please the Court, to save time, may it be understood that my objection goes to the entire line of examination without repeating it continuously?

Mr. Moore. It is so stipulated. (227.) * * *

Mr. Wrigley. At this time I want to move to strike out the entire testimony of this witness on the ground that it is an attempt to vary the terms of a written contract which the parties formally entered into at a later date. Section 1625 of our Civil Code of Cali-

fornia provides that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning matters which preceded or accompanied the execution of the instrument. (230, 231.)

The Court. I will allow it to go in so we can have a record on the ground of the witness not being available, and it is all going in subject to your motion to strike and your objection, and I will give both sides an opportunity to examine into the matter fully. (230.)

(b) During the cross-examination of J. A. Dowling he was asked by counsel for plaintiff as to a conversation held on December 29, 1939, in plaintiff's office as to how framework or falsework should be built and who should pay for it. (305.) The following occurred:

Mr. Wrigley. I object to that as incompetent, irrelevant, and immaterial, and an attempt to go back over a written contract, which is prevented by Section 1625 or our Code. The parties agreed to a writing, in which the obligations of each party were stated. An attempt to reopen that in order to vary the contract I say is objectionable. * * * (306.)

The Court. Pardon me. What was the date of the meeting? (308.)

Mr. Moore. December 9, 1939. (Meaning December 29, 1939.) * * * (308.)

The Court. The objection may be overruled. You may answer. (320.)

After the overruling of the objection, testimony was received as to details of drawings, one of which, the witness testified was not the drawing submitted in Court which was supposed to show the falsework and which plaintiff claimed defendants agreed to pay for and erect, various bids made by plaintiff, letters concerning the basis of bid, all antedating January 6, 1940, the date of the contract, and the following occurred:

Mr. Wrigley. Just a second, Mr. Dowling. So the record will be clear, will it be stipulated, in the interest of time, that I object to this entire line of examination, that it all goes in subject to my objection and my motion to strike? (322, 323.)

Mr. Moore. It will be stipulated. * * * (323.)

A letter dated December 11, 1939, Plaintiff's Exhibit 21, that purported to contain the terms of the contract, was offered in evidence.

Mr. Moore. I will introduce this in evidence, your Honor.

Mr. Wrigley. Same objection. (323.)

The Court. Let it be admitted and marked. (324.)

(c) Through witness Edward L. Soulé (371 to 378) testimony was elicited, over defendants' objection, as to conferences showing estimates and bids made by plaintiff prior to the execution of the contract, drawings made by plaintiff's representative, details as to the type of supporting devices, or falsework to be constructed, how the estimate was scaled down from $30.00 a ton for the placing of the re-

inforcement bars to $28.60, then further reduced by $3.77 a ton (377) representing the cost of the supporting devices, and a sum arrived at $24.80 as plaintiff's bid. Discussions as to type of falsework (380), welding of the bars, and statements alleged to have been made by a representative of defendant company that (382, 383) defendants would assume the cost of the falsework.

All the foregoing testimony was admitted over defendants' objection, and how finally the bid price was lowered to $22.75 and ultimately to $22.50 a ton. (384.)

Mr. Moore. We also offer a copy of letter of December 11th produced by Mr. Soulé and identified by him.

Mr. Wrigley. The same objection.

The Court. Same ruling.

(The document was received in evidence and marked "Plaintiff's Exhibit 23.") (388.)

(d) During testimony of Lester Earl Stevens (463) plaintiff sought, and the witness testified as to estimate made, prior to the execution of the contract, for placing the reinforcement steel bars and the cost of the falsework to support them, and during which testimony the witness stated his estimates were first with the cost of the falsework and revised thereafter to exclude this cost.

This testimony was objected to, as follows:

Mr. Wrigley. I want to object to this as incompetent, irrelevant, and immaterial, attempting to vary the terms of a written contract.

The Court. The objection is overruled. * * *(463.)

Mr. Wrigley. Same objection to this entire line of examination. (463.)

The Court. Read the question, Mr. Reporter.

(Question and answer read.)

The Court. The objection is overruled. (464.)

Mr. Wrigley. Will you stipulate, Counsel——

Mr. Moore. I will stipulate.

Mr. Wrigley (continuing). ——that my objection runs to this entire line of examination, and I will in due course make a motion to strike out?

Mr. Moore. So stipulated. (464.)

(e) Testimony was offered by plaintiff through Alexander Cochrane (476) as to conversations had in December, 1939 regarding the preparation of a draft of a plan showing the falsework and reinforcement bars, the various sums suggested as the bid price of the work to be undertaken by plaintiff and that defendants agreed to pay for and construct the falsework. This line of testimony was objected to by counsel for defendants.

Mr. Wrigley. I object to this as incompetent, irrelevant, and immaterial, and an attempt to vary the terms of a written contract in violation of Section 1625 of the Civil Code. (476.)

The Court. The objection is overruled. (477.)

Mr. Wrigley. Can we stipulate, Counsel, that my objection goes to this entire line of examination?

Mr. Moore. It will be so stipulated. (478.)

Thereafter counsel for defendants argued the motion to strike all testimony seeking to vary the terms

of the written contract, and the Court, after hearing argument, denied the motion to strike.

On April 19, 1943, the District Judge made the following order denying motion to strike certain testimony (47):

The parties hereto being present as heretofore, the further trial of this case was this day resumed. Mr. Wrigley made a motion to strike certain testimony, and after argument by Mr. Wrigley and Mr. Moore, it is ordered that said motion to strike certain testimony be denied. The evidence being closed, and the case, after argument by the attorneys, being submitted and fully considered, it is ordered that judgment be entered in favor of plaintiff on findings of fact and conclusions of law, and that the defendant take nothing on the cross-claim. (36.)

7. The Court erred in accepting any testimony to vary the written contract of January 6, 1940, or the terms of the contract between United States Department of the Interior (Bureau of Reclamation) with defendant Union Paving Co. (Defendants' Exhibit T), as the contract of January 6 reduced all prior negotiations to a written form, from which the intent of the parties is to be ascertained. The contract of January 6, 1940 was unambiguous and certain, as were the terms of the contract between Union Paving Co. and the United States Department of the Interior, the terms and conditions of which plaintiff was bound by specific reference in the contract of January 6, 1940 and required plaintiff to place the reinforcement bars at a unit bid price, which

price "shall include the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, cleaning, placing and securing and maintaining in position all reinforcement bars." (Sec. 66 Contract between United States and Union Paving Co., Ex. T.)

8. The evidence does not support the findings of the District Court in the following respects:

(a) That the contract was uncertain, ambiguous and indefinite as to who should pay for the cost of the falsework, scaffolding and interior framework. (Finding VIII, 51, 52.)

(b) That during preliminary negotiations prior to entering into the contract, defendants agreed to pay the cost of the falsework, scaffolding and interior framework and that defendants eliminated such cost from their bid. (Finding VIII, 51, 52.)

(c) The conclusions of law are contrary to the laws of the State of California and the decisions of this Court applicable to the evidence submitted.

9. There is no evidence or finding to support the conclusion that there was any attempt on the part of defendants to falsify any declaration, act or omission made or performed by defendants. No question of fraud or falsification entered into the case, nor is any alleged or charged. (Conclusion II, 62, 63.)

10. The District Court committed an error of law in denying the motion for new trial which included the grounds, among others, that plaintiff had failed to give notice of rescission or rescinded its contract.

(71.) This, in view of the undisputed testimony that plaintiff proceeded with the work provided for under the contract after it was aware that it was called upon by defendants to perform this work, when more than 50 per cent of the contract remained to be completed and that the plaintiff thereafter accepted benefits in the form of payments after being aware of what it was expected to do under the contract.

ARGUMENT.

POINT ONE.

THE SUBCONTRACT BETWEEN UNION PAVING AND SOULE STEEL EXPRESSLY PROVIDES THAT SOULE FURNISH ALL TEMPORARY SUPPORTS TO HOLD REINFORCEMENT BARS DURING THE PLACING OF CONCRETE AND THAT AT ITS OWN COST AGREES TO PROVIDE ALL LABOR, MATERIALS, TOOLS, ACCESSORIES AND EQUIPMENT AND PERFORM AND OBSERVE ALL THE PROVISIONS CONTAINED IN PARAGRAPH 66 OF THE CONTRACT BETWEEN THE DEPARTMENT OF INTERIOR AND UNION PAVING CO.

The specifications for the contract between the Department of the Interior and Union Paving Co. (Exhibit T, at p. 35, Sec. 66), after stating that the reinforcement bars will be furnished by the Government, and other matters relating to the removal of all rust from the bars, (Section 66) provides:

> "Reinforcement bars shall be accurately placed and secured in position so that they will not be displaced during the placing of the concrete, and special care shall be exercised to prevent any disturbance of the reinforcement bars in concrete that has already been placed. Metal chairs, metal hangers, metal spacers, and other metal supports

satisfactory to the contracting officer may be furnished and used by the contractor for supporting reinforcement bars. Wherever necessary, in the opinion of the contracting officer, to prevent future damage to the concrete or unsightly rust stains on exposed concrete surfaces, all such supports for reinforcement bars shall be made of noncorrodible metal. Payment for placing reinforcement bars will be made at the unit price per pound bid therefor in the schedule, which unit price shall include the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, cleaning, placing, and securing and maintaining in position all reinforcement bars, as shown on the drawings or as directed by the contracting officer." (35.)

The first lines of the last quoted language are called to the Court's attention:

> "Reinforcement bars shall be accurately *placed and secured in position so that they will not be displaced during the placing of the concrete,*"

and the concluding sentence of the section concerning the payment for placing the bars will be made at a unit price per pound which price shall include

> "the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, cleaning, *placing, and securing and maintaining in position all reinforcement bars.*"

The pertinent provisions of the subcontract between Union Co. and Soulé Steel provides:

"The subcontractor at its own cost agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications." (15.)

The word "specifications" refers to the specifications between the Department of the Interior (Bureau of Reclamation) and the Union Paving Co.

Other provisions of the subcontract that we believe provide that Soulé was to have built the falsework and interior framework, are the following:

"24—Materials to be furnished by the subcontractor:

The subcontractor at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding, in accordance with the provisions of paragraph 24 of said specifications." (Again the word "specifications" referred to the specifications between Union and the Government.)

"45—Welding reinforcing bars:

The subcontractor at its own cost agrees to provide all labor, materials and equipment and cut the ends of the bars for welding and provide all clamps, tie rods, cables, blocking, anchors, and other accessories that may be required, including the placement of backing-up strips and shall firmly and securely hold the reinforcing bars in position in accordance with the provisions of

paragraph 45 of said specifications, excepting therefrom only the labor, materials and equipment necessary for the welding of the joints for which work other contractors will be employed." (14, 15.)

The language we wish to emphasize under paragraph numbered 24 of the subcontract is that the subcontractor is to furnish

"all labor, wire, wire ties, rods *or other materials and appliances used for securing reinforcement bars, metal or other temporary supports,* if used, *to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding,*"

And again we desire to call the Court's attention to the work required of the subcontractor in preparation of the welding of the reinforcement bars, in which, under the paragraph numbered 45, it agrees to furnish at its own cost all labor, materials and equipment,

"all clamps, tie rods, cables, blocking, anchors, and other accessories that may be required, including the placement of backing-up strips and shall firmly and securely hold the reinforcing bars in position while the joints are being welded in accordance with the provisions of paragraph 45 of said specifications, * * *" (14, 15.)

At this point it might be well to give a brief explanation of what the operation of placing reinforcement bars entailed. This required above the foundation of

the piers, placing at variable oblique or sloping position upward as well as horizontally, the steel bars around which was to be poured the concrete.

The vertical bars which were of a size of approximately two inches square and in lengths of approximately 60 feet and weighing from 800 to 900 pounds (429, 430), obviously could not remain upright without supports; hence the necessity for the falsework or interior framework to keep these bars in an upright and firm position until they were prepared for welding to the next length to be attached to those placed in position and finally to have concrete poured about them.

That the construction of the falsework and interior framework by the Soulé Steel Company was contemplated by the subcontract is shown by exceptions made where this was not intended and Union Paving Co. assumed the burden. There were cores on Piers 3 and 4 (170) that primarily were concrete construction and falsework or interior framework had to be built to pour the concrete around these cores.

In the contract it is provided:

> "The contractor at its own cost agrees to provide an accessible roadway from Highway 99 to the base of all piers and abutments; construct a wooden trestle over and about the base of all pier excavations *and construct wooden cores as shown on the plans which may be used by the subcontractor as a supplementary support for reinforcement bars;* said subcontractor assuming the risk of any damage to said trestles or cores arising directly or indirectly from the use thereof and

shall save and hold harmless said contractor from any damages, claims or losses." (16.)

If it were not intended under the subcontract that the Soulé Company was not to build the falsework and interior framework, there was no reason to state that where there were cores in the piers that Union Co. would undertake to build those, and which structures could then be used by Soulé to support the reinforcement bars. If Union Co. were supposed to build all the falsework and interior framework, what would have been the purpose of incorporating the section of the contract last quoted?

When Union through J. A. Dowling, its manager, was unable up to October 15, 1940, to reach an agreement with Mr. Stevens, the partner and representative of the Soulé Company, at the place of construction, as to the proportion of cost for falsework, Union then set up its books in a more than equitable fashion, charging the cost of all the falsework and interior framework which it had constructed and paid for on the equitable basis of $56,803 to Union Paving Co. and $61,112 to Soulé Steel Company. (Exhibit Y, 286, 287.) No charges were allocated against Soulé for Abutments 2 and 4, or Piers 8, 9 and 10.

We feel the subcontract, for the reasons stated, and the reading of the contract itself clearly illustrates that Soulé Steel Company obligated itself to construct all falsework and interior framework other than in the piers where cores were provided for and where Union Paving Co. charged itself when Soulé was not primarily to use the falsework or interior framework.

POINT TWO.

CERTAIN CHARGES FOR TEMPLATES, SPACERS AND LUMBER WERE ADMITTED AS CHARGEABLE BY SOULE AGAINST IT, BUT FOR WHICH THE COURT ALLOWED NO CREDIT.

Loren Hunt (157, 158, 167) testified that no charges were made against Soulé for any of the exterior framework that was used primarily by Union Co. The interior falsework or framework that was used, in the first instance by Soulé was charged against the Steel Company. The witness testified separate accounts were kept as to the materials used and the cost of labor. The result of these figures is reflected in Exhibit Y. (286, 287.)

L. E. Stevens, the partner of Soulé testified (423) the spacers used in the interior falsework were used principally to support the steel work, and "stiffeners" also used on this interior framework had no use in pouring concrete. This also applied to templates. (423.) And other than in some instances this work was done and paid for by Union Co. This, of course, would include all lumber, bolts, nails and other materials. The District Court, however, in its judgment failed to in any way credit Union with any of the costs of the items in this subdivision of the brief referred to, and it follows that the judgment of the District Court is therefore obviously inaccurate, at least to the extent of the cost of the items specified.

POINT THREE.

ON OCTOBER 15, 1940 SOULE ADMITS KNOWING FALSEWORK AND INTERIOR FRAMEWORK WAS TO BE CHARGED TO IT, WHEN THE CONTRACT WAS LESS THAN 50 PER CENT COMPLETED, AND FAILED TO GIVE NOTICE OF RESCISSION OR RESCIND THE CONTRACT. THE FAILURE TO RESCIND PRECLUDES SOULE FROM RECOVERING.

The facts to be noted in considering this point of our brief are that the Soulé Company admits by October 15, 1940, it knew Union Co. was charging against Soulé a portion of the cost of the falsework and interior framework. Mr. Dowling, manager of Union Co., testified he advised Mr. Stevens at the job site as early as July, 1940 that Soulé was expected to pay its proportion of the falsework and interior framework. This is disputed. But it is a fact that on October 15, 1940 there remained more than 50 per cent of the contract to be completed, and further it is a fact that Soulé continued to complete the work under the contract until May 31, 1941 (6) which was the date of completion.

In other words, Soulé continued, taking the most advantageous date in behalf of Soulé as October 15, 1940, for 7½ months thereafter and, after being aware it was to stand its share of the cost of the falsework and interior framework, continued work under the contract until completed.

Another fact to be borne in mind is that Soulé accepted payments from Union Co. under the contract after October 15, 1940, namely, on January 18, 1941 in the sum of $20,000 (95), and on December 31, 1941 of $16,000 (59).

The complaint in this action is based on the contract (6) and seeks to recover damages because of the alleged breach of the contract. It is our contention that the law of California is quite clear on this subject.

There were two remedies, and only two remedies, that Soulé could pursue, assuming that October 15, 1940 was the first date it was notified that the Soulé Company was expected to pay a portion of the costs of the falsework and interior framework. These two remedies were: (1) That it might have treated the contract as rescinded and ceased work thereunder and sued for the value of labor and materials furnished to the date of the alleged breach justifying the rescission, or (2) It might have proceeded with the contract and advised the Union Co. it intended to complete the contract, reserving its right to claim damages on the completion of the contract.

Of course, before either of these steps were necessary for Soulé to select from, a few lines in the contract could have readily been supplied by Edward L. Soulé, a man of wide experience in the steel construction business and as familiar with contracts as was J. A. Dowling, the manager of the Union Co., to the simple effect that Union Co. was to pay the cost of all falsework and interior framework.

As illustrative of the soundness of our position, we respectfully call the attention of this Court to the law of California, which is controlling in this case:

Erie Railroad Co. v. Tompkins, 304 U. S. 64.

Under Section 1688 of the Civil Code of California a contract is extinguished by its rescission, and under Section 1691 of the Civil Code:

> "Rescission, when not effected by consent, can be accomplished *only* by the use on the part of the party rescinding, of reasonable diligence to comply with the following rules:
>
> "(1) He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind; * * *"
>
> *Civil Code,* Section 1691.

This section has been applied uniformly and strictly by the Supreme Court of California in decisions which are, of course, binding upon this Court.

Cox v. McLaughlin, 54 Cal. 605;

Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164;

Bailey v. Fox, 78 Cal. 389, 20 Pac. 868;

Wills v. Porter, 132 Cal. 516, 64 Pac. 896;

California Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593;

Brown v. Domestic Utilities Manufacturing Co., 172 Cal. 733, 159 Pac. 163;

Schneider v. Henley, 61 Cal. App. 758, 215 Pac. 1036 (per St. Sure, J.).

There are three recent cases dealing with rescission of contracts that have been decided by this Court in which the reasoning contained therein is applicable to the case at bar.

The first case we refer to is

Six Companies of California v. Joint Highway District, 110 F. (2d) 620.

This case held that the rescission attempted under the facts of that case was not warranted.

The second case,

Wenzel & Henoch Const. Co. v. Metropolitan Water District of Southern California, 115 F. (2d) 25 (1940),

concerned itself about work to be done in the way of excavation in the construction of the San Jacinto Tunnel as part of the Colorado River Aqueduct Project. The district in that case gave notice of suspension of the contract and ejected the construction company from the works.

In passing on the question of necessity for rescission of such a contract on the part of the plaintiff before the plaintiff could be successful, this Court holds at page 32:

> "Although under the California rule in building contracts the failure to pay an installment when due is not such a breach as will support an action on the contract for full performance, it will support a rescission of the contract and recovery in quantum meruit. Cox v. McLaughlin, 54 Cal. 605, 608, 609, 610; Cox v. McLaughlin, 76 Cal. 60, 62, 63, 18 P. 100, 9 Am. St. Rep. 164; Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 502, 503, 35 P. 146; San Francisco Bridge Co. v. Dumbarton Land & Improvement Co., 119 Cal. 272, 274, 51 P. 335; see Fairchild-Gilmore-Wilton Co. v. Southern Ref. Co., 158 Cal. 264, 274, 110

P. 951, and Connel v. Higgins, 170 Cal. 541, 150 P. 769, 772; Monson v. Fischer, 118 Cal. App. 503, 519, 5 P. 2d 628. Rescission of the contract in such case, however, must be within a reasonable time of the breach. Cal. Civil Code § 1691; Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 736, 159 P. 163; Bancroft v. Woodward, 183 Cal. 99, 107, 108, 190 P. 445; Davis v. Rite-Lite Sales Co., 8 Cal. 2d 675, 682, 67 P. 2d 1039.

"Assuming that it was still reasonable for the Company to elect to rescind the contract because of the alleged breach of January 9, 1935, after the District had served its notice of suspension of work under the contract and had ousted the Company from the work, the fact remains that such an election was never made."

Another and more recent case than the *Wenzel & Henoch* is

Transbay Construction Co. v. City and County of San Francisco, 134 F. (2d) 468 (1943).

San Francisco entered into a contract with Transbay Construction Company to raise O'Shaughnessy Dam, part of the city's water distribution system, 85 feet above its existing level. It was estimated by the city that 30,000 cubic yards of excavation would be necessary and it developed that 84,000 cubic yards had to be removed before a firm foundation was reached. This action and the fact that the city had ordered the additional excavation in small quantities delayed Transbay in completing the contract more than a year, for which Transbay sought damages.

The contractor knew after the excavation was completed that it would require additional time to complete the contract, but failed to give notice that it rescinded the contract or served notice on the city that it intended to continue under the contract and expected to be reimbursed for damages suffered.

In passing on the necessity for the rescission, the Court held at page 472:

> "The suit is governed by local law. The California Civil Code, § 1688, provides that a contract is extinguished by its rescission. Section 1691 of the Civil Code states: 'Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: 1. He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right * * *.' This statute has been strictly applied by the California courts. Wills v. Porter, 132 Cal. 516, 521, 64 P. 896; Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 159 P. 163; see California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593."

The effect of this decision is that as Transbay Construction Company failed to rescind its contract and proceeded with the work provided for under the contract it could not thereafter recover.

This doctrine of the necessity of rescission of a contract is nothing new or novel, as is evidenced by the decisions of our California Courts and of this Court. It was recognized under Roman and English law.

It was only fair and equitable for Soulé to unequivocally notify Union Co. that it expected to be relieved of its contractual obligation to pay for the construction of the falsework and interior framework so that Union, if it had a different interpretation from Soulé, would be accorded the opportunity of having some other steel company continue with the contract.

We believe that legally we have illustrated by the authorities cited that before Soulé Company could have recovered it was necessary that it give notice of rescission and rescind its contract. On this ground alone the entire case should be reversed.

POINT FOUR.

THE DISTRICT COURT ERRED IN ADMITTING PAROL EVIDENCE THAT TENDED TO ALTER THE TERMS OF THE WRITTEN CONTRACT BETWEEN UNION AND SOULE.

The record is replete with admissions of parol evidence over objections of counsel for the defendants and some of them are referred to in our specifications of error number 6. The contract between the parties to this action was written and dated and entered into on January 6, 1940. At page 226 of the transcript the following appears while Ross L. Mahon was being questioned by plaintiff's counsel:

Q. Directing your attention to the month of October, 1939, were you present at a conference between Mr. Soulé and Mr. Dowling?

Mr. Wrigley. Just a second, please. I want to object to this as irrelevant, incompetent and imma-

terial. The parties in this case entered into a formal written contract as of January 6, 1940 that superseded all prior negotiations, discussions, offers and everything else, and anything they may have agreed prior to that date was carried into the contract and cannot be admissible under the California Civil Code, Section 1625.

Mr. Moore. I did not want to argue that, if I could take this statement from the Colonel at this time. It will be very short, and then we can argue it later.

The Court. I will allow it subject to a motion to strike. * * *. (226, 227.)

Mr. Wrigley. May it please the Court, to save time, may it be understood that my objection goes to the entire line of examination without repeating it continuously?

Mr. Moore. It will be so stipulated. * * *. (227.)

At the Hotel Senator, Sacramento (228) October 4th (1939) (227) the witness stated he was in Mr. Dowling's room.

Q. Approximately what time was that?

A. I should say at least 10:00 or 11:00 o'clock in the evening, perhaps a little later, and I base that on the fact that Mr. Dowling was in bed at the time.

Q. Was anybody else there besides yourself and Mr. Soulé and Mr. Dowling?

A. To the best of my recollection, nobody was in that room when we talked this thing, except Mr. Dowling, Mr. Soulé, and myself.

Q. Now, will you relate the conversation as nearly as you recollect it?

A. A bid was presented to Mr. Dowling in which we quoted a price—my recollection is that it was $33.80 a ton—on the reinforcing steel for this Pit River Bridge, installed, including, among other things, the cost of the unsupporting structure for same, that being in accordance with his expressed desire previously. (229, 230.) * * *

Mr. Wrigley. At this time I want to move to strike out the entire testimony of this witness on the ground that it is an attempt to vary the terms of a written contract which the parties formally entered into at a later date. Section 1625 of our Civil Code of California provides that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning matters which preceded or accompanied the execution of the instrument.

The Court. I will allow it to go in so we can have a record on the ground of the witness not being available, and it is all going in subject to your motion to strike and your objection, and I will give both sides an opportunity to examine into the matter fully. (230, 231.)

On cross-examination of J. A. Dowling the following occurred:

Q. As a matter of fact, on December 29, 1939, did you not have a conference at the office of the Soulé Steel Company with Mr. Cochrane, who was then your superintendent, Mr. Stevens, and Mr. Soulé?

Mr. Wrigley. I objected to that as incompetent, irrelevant, and immaterial, and an attempt to go back

over a written contract, which is prevented by Section 1625 of our Code. The parties agreed to a writing, in which the obligations of each party were stated. An attempt to reopen that in order to vary the contract I say is objectionable. (305, 306.)

Then followed an argument between counsel, and at page 320 we find:

The Court. The objection may be overruled. You may answer. (320.)

And thereafter counsel for defendants quizzed the witness on numerous incidents relating to matters occurring prior to entering into the contract and introduced a memorandum (Plaintiff's Exhibit No. 21) (324, 325, 326) dated December 11, 1939, that directly contradicts the terms of the written agreement. This document of December 11, 1939 was prepared prior to the entering into the contract between plaintiff and defendants, and the following occurred:

Mr. Moore. I will introduce this in evidence, your Honor.

Mr. Wrigley. Same objection.

The Court. Let it be admitted and marked.

(The document was thereupon received in evidence and marked "Plaintiff's Exhibit 21," and was read by Mr. Moore.) (323, 324.)

For the convenience of the Court, this plaintiff's Exhibit 21 is here reproduced and is as follows:

Plaintiff's Exhibit No. 21

Los Angeles
Portland
Houston

Telephone
VAlencia 4141

(Emblem) SS. Co. Iron and Steel Products
Soule Steel Company
Iron and Steel Products
1750 Army Street, San Francisco

December 11, 1939

Gentlemen:

Re: Abutments and Piers, Pit River Bridge
Relocation of Southern Pacific Railway and
U. S. Highway 99

In regard to the labor of installing the reinforcing steel bars, Bid item No. 11, as specified for the construction of the above project in accordance with plans and specifications prepared by the United States Department of the Interior, Bureau of Reclamation, we are pleased to quote you as follows:

1. We are to receive the reinforcing steel bars f.o.b. cars Redding, California.

2. The 2″ square bars are to be bent at supplier's mill, all other bars are to be furnished in straight lengths.

3. We are to be responsible for the unloading, checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by ~~you~~. us, (~~We estimate the storage lot size should be about 150′ x 350′ and adjoining a rail track.~~) (the rental of which shall not exceed $30.00 per month.*)

*Words in ( ) were inserted in copy in pencil.

4. We will do the cutting, bending and shaping of 2″ bars preparatory to welding, loading on to trucks and transporting to jobsite to conform to your construction schedule.

5. You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, (or a wooden trestle which we may be for our use.*)

6. We will furnish all labor (including insurance) to do the placing of the reinforcing steel, including tie wire and accessories under above bid item No. 11 (but not including welding). (Fig. 7 in circle.)

7. You ~~will pour concrete "pyramids~~" (are to furnish wood supporting framework*) in the base of piers # 1, 2, 3, 4, 5, 6 and 7 (and/or will furnish and erect wood core forms and/or steel supports, against which the 2″ bars can be supported.)

8. ~~We have provided in this proposal for a job engineer 16 months @ $300.00 per month, which cost will be borne equally~~. Marginal notation (omit).

9. Sufficient lights will be furnished by you; also power outlets will be available for our use.

Price: As specified for the above items, the unit price of $24.80 per ton.

If a bond is required, the same will be for your account.

Payments are to be made on or about the 10th of the following month for 85% of the value of the work performed during the preceding calendar month, and the remaining 15% to be paid 30 days after completion of our portion of the work.

Note: We are not to be held responsible for failure by delay or default arising from strikes, lockouts or other contingencies beyond our control.

If the above is in accordance with your understanding, please accept in the lower left hand corner, and it will constitute an agreement between us.

Sincerely yours,
Soule Steel Company
By Edw. L. Soule

Accepted:
Union Paving Company
By (Figure seven in circle.)

(You are to pour concrete "sills" as required, in the base of the piers to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mats, the steel shoes, which support the 2" vertical bars, are to be placed.*)
ELS:DL

Quotations subject to change without notice. All sales, contracts, or agreements subject to strikes, accidents or causes beyond the company's control. (324, 325, 326, 327.)

Again we find when Witness Lester Earl Stevens was called for plaintiff and was asked:

Q. During that period of time did you make various estimates with relation to the cost of placing the reinforcement steel, working in collaboration with Mr. Soulé?

A. Yes.

Mr. Wrigley. I want to object to this as incompetent, irrelevant, and immaterial, attempting to vary the terms of a written contract.

The Court. The objection is overruled.

A. Yes, we did.

Mr. Moore. Q. Did those estimates include supporting devices?

A. They did at first.

Q. Or supporting members?

A. Yes. (463.)

After tracing where he had gone, the witness said he returned to San Francisco December 28th (referring to the year 1939). (463.)

* * * * * * *

Q. Did you at that time revise the former estimates that had been made, or assist in the collaboration of that?

A. Yes, we did.

Q. And did those new estimates include or not include the reinforcing members?

A. They did not.

Mr. Wrigley. Same objection to this entire line of examination.

The Court. Read the question, Mr. Reporter.

(Question and answer read.)

The Court. The objection is overruled.

Mr. Wrigley. Will you stipulate, Counsel——

Mr. Moore. I will stipulate.

Mr. Wrigley (continuing). ——that my objection runs to this entire line of examination, and I will in due course make a motion to strike out?

Mr. Moore. So stipulated. (463, 464.)

The record discloses (47) on April 19, 1943 the District Judge made the following order denying motions to strike all the evidence that was introduced

by plaintiff about facts occurring prior to January 6, 1940:

"The parties hereto being present as heretofore, the further trial of this case was this day resumed. Mr. Wrigley made a motion to strike certain testimony, and after argument by Mr. Wrigley and Mr. Moore, it is ordered that said motion to strike certain testimony be denied. The evidence being closed, and the case, after argument by the attorneys, being submitted and fully considered, it is ordered that judgment be entered in favor of plaintiff on findings of fact and conclusions of law, and that the defendant take nothing on the cross-claim." (47.)

The foregoing illustrations, which are only a few of many, are deemed sufficient to call this Court's attention to the admission of evidence of conversations and acts occurring prior to the execution of the contract between the parties litigant.

We respectfully contend that this is reversible error on the part of the District Judge.

The Court's attention is directed to section 1625, Civil Code, reading as follows:

> "§ 1625. (Effect of written contract.) The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

And under the heading of Rules of Interpretation of Contracts, the following sections of the Civil Code are called to the Court's attention:

"§ 1638. Intention to be ascertained from language. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

"§ 1639. Interpretation of written contracts. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."

"§ 1641. Effect to be given to every part of contract. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

"§1643. Interpretation in favor of contract. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

"§ 1649. Interpretation in sense in which promisor believed promisee to rely. If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

We also believe that section 1856 C. C. P., in so far as the first paragraph of that section, applies. We do not believe that it falls within the exceptions thereafter noted in the section.

Section 1856 reads in part:

"§ 1856. An agreement reduced to writing deemed the whole. When the terms of an agree-

ment have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: * * *."

In construing the sections above referred to, *Cal. Jur.* Vol. 6, at pp. 297, 298, under the caption of *Contracts,* states the basis upon which the reconciliation between the sections should be made:

"But, it has been declared, section 1860 of the Code of Civil Procedure is not to be read as applicable to every contract that may come before the court for interpretation. It has its limitations and must be read in connection with other provisions of the code. To give it literal and universal application would bring it into direct conflict with section 1856 of the Code of Civil Procedure, which provides that, as a general rule, a contract in writing is presumed to contain all the terms of the agreement. Section 1625 of the Civil Code must also be read and harmonized with section 1860 of the Code of Civil Procedure. It reads:

" 'The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.'

"It is only where it is doubtful, uncertain or ambiguous that the surrounding circumstances become important in ascertaining the intent of the parties. The rule of evidence embodied in the code sections quoted above is invoked only

> in cases where upon the face of the contract itself there is doubt, and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said. These sections of the code simply enact the common-law rule, and it is not within their contemplation that a contract reduced to writing and executed shall have anything added to it or taken away from it by such evidence of 'surrounding circumstances.' Where the parties have themselves used words which require no interpretation, where the words are understood, there is no occasion for aid to their proper interpretation of meaning. * * *"

Some of the more recent cases sustaining the above text and that it is the duty of this Court to construe, irrespective of what findings may have been made by the District Court as to its interpretation of the agreement, are:

Brant v. California Dairies, 4 Cal. (2d) 128, 133, 134, 48 Pac. (2d) 13;

Tanner v. Title Ins. Trust Co., 20 Cal. (2d) 814, 824, 129 Pac. (2d) 383;

Watson v. Peyton, 10 Cal. (2d) 156, 73 Pac. (2d) 906.

It is respectfully submitted that the contract between the parties litigant is clear, positive and certain and there is no latent ambiguity therein or writing that requires any technical interpretation so that the true intention of the parties may be determined. The contract provides that Soulé would supply "or other materials and appliances used for securing reinforcement bars, metal or other temporary supports," (14) and

at its own cost will provide "all labor, materials and equipment and cut the ends of the bars for welding and provide all clamps, tie rods, cables, blocking, anchors, and other accessories that may be required, including the placement of backing-up strips and shall firmly and securely hold the reinforcing bars in position while the joints are being welded * * *" (14, 15) and at its own cost agrees to "provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions" (15) that are contained in paragraph 66 of the contract between Union and the Department of the Interior.

That the Court should not have gone outside of the written, unambiguous agreement is further emphasized as Union Company undertook to build some of this falsework and interior framework on certain abutments and "construct a wooden trestle over and about the base of all pier excavations and construct wooden cores as shown on the plans which may be used by the subcontractor as a supplementary support for reinforcement bars;" (16).

The contract was entered into January 6, 1940, and the Court permitted interested parties to testify beginning April 8, 1943 as to conversations held three years and three months after they had occurred. This we emphasize as clearly unfair on the part of the District Court to allow such testimony in the record, as the minds of men are finite and most of us have difficulty in recalling what was said a short time ago, much less what may have been said three years and three months ago. Hence written contracts were evolved and are to be taken and mean what they say.

We therefore conclude that we have illustrated the contract was unambiguous and provided that Union Company was to do the falsework and interior framework on the cores of the piers which it did and charged itself for this work and that Soulé Steel Company, because of the nature of its work had to, above the foundation lines, build falsework and interior framework to put up the reinforcement bars.

We have illustrated the District Court failed to give credit to the cost of templates, labor and incidentals for work that Soulé Company admits was its own and should be charged with it.

Next we illustrated the inequity on the part of Soulé in not rescinding its contract immediately following October 15, 1940 when it knew that it was to be charged with the cost of the interior framework and falsework, which we emphasize is an insurmountable barrier preventing Soulé from recovering, and lastly we have pointed out the legal errors committed by the District Court in accepting parol evidence to vary the terms of an unambiguous written contract.

For the reasons stated, the case should be reversed and judgment ordered in favor of Union Paving Co. and all other defendants.

Dated, San Francisco,
February 14, 1944.

Respectfully submitted,
DION R. HOLM,
HENRY F. WRIGLEY,
Attorneys for Appellants.